

1 (Proceedings called to order)

2 THE COURT: All right. Good morning. And let
3 me have just a moment here. Thank you.

4 All right. The Court calls the following
5 cases:

6 17-M-4409, United States of America versus Elba
7 Luz Dominguez-Portillo;

8 In EP:17-M-4456, United States of America
9 versus Maynor Alonso Claudino Lopez, EP:17-M-4461;

10 United States of America versus Jose Francis
11 Yanes-Mancia;

12 EP:17-M-4462, United States of America versus
13 Natividad Zavala-Zavala;

14 And EP:17-M-4499, United States of America
15 versus Blanca Nieve Vasquez-Hernandez.

16 We are here for an evidentiary hearing. We're
17 also here for a *Frye Lafler* hearing.

18 Let me have announcements, please.

19 MS. LOPEZ: Good morning, Your Honor. Noemi
20 Lopez, Douglas Rennie, and we're ready for the United
21 States.

22 THE COURT: Good morning.

23 MR. GARCIA: And good morning, Judge. Sergio
24 Garcia, on behalf of all the defendants. Ready to
25 proceed, Judge.

1 THE COURT: Good morning.

2 All right. We do have a pending motion to
3 dismiss that the defendant -- the defendants filed. The
4 Court ordered an evidentiary hearing to afford the
5 parties the opportunity to present any evidence that
6 they felt might be necessary. We discussed this briefly
7 at the hearing last week.

8 Let me start with the -- with Mr. Garcia. Do
9 you have any evidence that you wish to put on?

10 MR. GARCIA: No, Judge. We'd just like to --
11 to request argument so that we can establish a clear
12 record for purposes of any possibility of appeal.

13 THE COURT: All right. Let me ask the
14 government. Does the government have any witnesses it
15 wishes to present?

16 MR. RENNIE: No, Your Honor, we do not.

17 THE COURT: Okay. Thank you.

18 And, you know, I'll give you, in terms of -- of
19 argument, I guess, basically, at this point, if you want
20 to just address the substance of the motion to dismiss,
21 we can take that up, and -- but I'll give you --

22 MR. GARCIA: I'll only need about five, ten
23 minutes just -- just to argue, just to make sure that
24 the record is clear.

25 THE COURT: Okay.

1 MR. GARCIA: It's important that the record is
2 clear.

3 THE COURT: Let's try to go with about five, if
4 we could, and I'll give the government, obviously, the
5 same opportunity.

6 MR. GARCIA: Thank you, Judge.

7 THE COURT: Yes, sir.

8 MR. GARCIA: Thank you, Judge.

9 Judge, with respect to our motion to dismiss,
10 it is important to understand that we are not here with
11 our motion testing the strength or the weakness of a
12 1325 charge. We actually are arguing that these
13 defendants shouldn't even be here. They should be in
14 immigration court.

15 What we're arguing is the element of
16 compulsion, in other words, the separation from their
17 children that removes the voluntariness of any possible
18 plea in violation of due process. The law is clear
19 under the Flores Settlement Agreement, these defendants
20 cannot be separated from their children.

21 Immigration Customs Enforcement, ICE, the
22 branch at interest, directives provide, quote, ICE
23 personnel should ensure that the agency's immigration
24 enforcement activities do not unnecessarily disrupt the
25 parental rights of both alien parents or legal guardians

1 of minor children. Particularly, attention should be
2 paid to immigration enforcement activities involving
3 parents or legal guardians who are primary caretakers,
4 safeguarding their parental rights, close quote.

5 The Supreme Court has stated that a basic right
6 and an essential right is that of a parent to the
7 custody of his children, and congress has manifested its
8 intent regarding these cases. When congress
9 appropriated Department of Homeland Security money, it
10 indicated, quote, If detention is necessary, the report
11 language encourages ICE to house family members together
12 in known communal home-like environments until the
13 conclusion of the immigration proceedings. That is the
14 Congressional Record 152. It could be found at 2006
15 Westlaw 1594390.

16 Clearly, the interest of -- of the intent of
17 congress is to keep these families together. In
18 addition, the Flores Settlement Agreement provides an
19 opportunity for release -- simultaneous release on an
20 immigration bond for the parent and the child. And when
21 that is not possible, congress has also manifested its
22 intent. It has indicated, quote, and when detention of
23 family units is necessary, the committee directs DHS to
24 use appropriate detention space to house them together,
25 close quote. And that is the Congressional Record 151,

1 and it could be found at 2005 Westlaw 1185446.

2 Keeping the families together is clearly the
3 intent of congress, and the government is violating the
4 law. It's breaking the law. It's not following the
5 law, and that implicates due process. Why? Because due
6 process applies to, quote, even those whose presence in
7 this country is unlawful, involuntary or transitory.
8 That is *Shaughnessy versus U.S.*, 345, U.S., 206, 1953.

9 The violation of due process occurs in two
10 ways. First, it deprives these defendants for an
11 opportunity to go through the immigration process and
12 perhaps obtain asylum. These defendants don't have any
13 prior record. If they obtain asylum, all of a sudden,
14 they have a status here in the country, and a 1325
15 charge doesn't work because, all of a sudden, they have
16 legal presence in this country.

17 It also violates due process in a most serious
18 way because it's coercing these defendants to plead
19 guilty. Can anybody doubt that these defendants want to
20 be with their children? They're not going to want to go
21 to trial. They want to get to them as soon as possible.
22 They left their countries with the most precious thing
23 they have, their children.

24 So this is a tactic to coerce the defendants to
25 plead -- to plead guilty. But the law is clear when it

1 comes to pleas. The law says that any plea that is the
2 product of coercion, either mental or physical, unfairly
3 obtained through ignorance, fears or inadvertence is not
4 good. And that is *Kercheval versus U.S.*, 274, U.S.,
5 220, 1927.

6 This tactic either renders *Padilla* ineffective,
7 because my work under *Padilla* in the Supreme Court
8 decision, I need to advise them of the consequences
9 of -- of entering, the immigration consequences, but I
10 can't do anything about it.

11 In -- in a brief, we describe the government
12 conduct as outrageous, and the government is surprised.
13 Why is this outrageous? Because it's breaking
14 congressional intent, it's not abiding by the -- by the
15 Flores Settlement Agreement, and they also have the
16 nerve to file a trial motion while a pretrial motion is
17 pending, the *Lafler Frye* hearing, which I would argue
18 could be constitute -- could constitute misconduct on
19 the part of the prosecution because we have a pretrial
20 motion pending, and that could be dispositive the *Lafler*
21 hearing -- *Frye* is something before we go to trial, so
22 we need to do that. They are doing all these tactics
23 simply to obtain a conviction, a misdemeanor conviction.
24 I would argue that that is outrageous.

25 I would also argue that the prosecution of

1 these defendants is in bad faith in violation of due
2 process. Why is it in bad faith? Well, because if
3 these defendants were allowed to go through the
4 immigration process, but for their 1325 charges, they
5 could be in immigration, seeking the protections that
6 they are probably entitled because these defendants
7 don't have any prior record.

8 Now, the government files a response, and I'd
9 just really like to address it for purposes of the
10 record. This response is meritless. At page 9, they
11 say "We don't cite any authority." Putting aside the
12 fact that this is a novel issue of first impression in a
13 criminal proceeding, the arguments that I'm raising, we
14 cite the first -- the Fifth Amendment. Last time I
15 checked, that was law and good law.

16 The problem from the government here is the
17 Fifth Amendment, because if these clients plead guilty,
18 they will face extreme hardship and will be prejudiced.
19 They are going to be deported with no guarantee of ever
20 seeing their children again.

21 So the government in their brief provides an
22 alternative, let's go to trial. Well, that puts my
23 clients in the same position. They are going to end up
24 being deported. They are going to end up being
25 convicted with a criminal record with no possibility, no

1 guarantee to see their kids again.

2 Furthermore, that doesn't address our position.
3 We're arguing in our motion that we shouldn't even be
4 here. These defendants should be in immigration court.
5 So that doesn't take care of our motion.

6 THE COURT: Let me interrupt you briefly. So,
7 I mean, your position, as I understand it, is that any
8 possible immigration relief that they might be entitled
9 to in, you know, citing the Flores Settlement and -- and
10 any -- the possibility of either pursuing asylum claims,
11 if that's what they wanted to do, or participating in
12 the immigration proceedings of their -- of their kids,
13 you're saying that that has to be a precursor to -- that
14 that should happen before the government prosecutes?
15 Because it seems to me the government has jurisdiction
16 to prosecute these cases.

17 There's been an entry -- I mean, there's an
18 alleged entry with -- their status is as aliens at the
19 time of their entry or attempted entry. And so,
20 jurisdictionally, I think they have the jurisdiction --
21 or it seems to me they have the jurisdiction to pursue
22 these charges.

23 Is that your position --

24 MR. GARCIA: My --

25 THE COURT: -- that the immigration processes

1 that you're talking about should be -- should be dealt
2 with before they're ever even prosecuted?

3 MR. GARCIA: Yes, because of all of the reasons
4 that I will briefly address, Judge, if you'll just let
5 me finish. That is correct.

6 Let me just go back quickly -- and I'll address
7 those concerns in a minute. But you're right, that's my
8 position. But I tell you what, I haven't really told
9 you why that is necessary.

10 Going to trial is simply another mechanism to
11 strip these defendants of their rights that they might
12 have in an immigration proceeding, and it's also
13 stripping the children away from the children [sic]
14 because let's -- let's not forget that these children
15 want to be with their parents too. We have a
16 seven-year-old kid involved in these cases. And can
17 anybody doubt that he wants to go to -- he wants to be
18 with his parents?

19 So going to trial, to answer your question,
20 it's also a violation of due process. Why? Because we
21 are missing the most important thing, the material
22 witnesses, the children. They don't have them here. In
23 fact, they don't even list them in their complaints.
24 Why? So even going to trial would be a violation of due
25 process.

1 The government is using a strong-arm approach
2 to coerce these defendants into pleading guilty, and the
3 [indiscernible] and red herrings. For example, at
4 Footnote 3, they suggest that these guys may not even be
5 their real parents. Well, if that was the case, the
6 government would not hesitate to bring felony charges
7 for trafficking minors.

8 At Footnote 8, they said that they are engaged
9 in criminal conduct. Well, seeking asylum, escaping
10 violence from your country, that's not a government --
11 criminal conduct.

12 At page 11, they said that they are concerned
13 because Latinos engage in trafficking minors. Well,
14 that is just stereotyping. That's profiling. Not every
15 Latino that crosses that border with a child is
16 trafficking minors.

17 At page 16 --

18 MS. FRANCO-GREGORY: Your Honor, I'm going to
19 have to object to the defendants' counsel's
20 characterization of the government stating Latinos
21 traffic minors. That is nowhere contained within the
22 response.

23 THE COURT: All right.

24 MR. GARCIA: If you look at page 11, Judge, and
25 you read it, you will make that decision. They're

1 clearly referring to a concern, because at the south
2 border, the Latinos, and most importantly, Mexicans,
3 they engage in this kind of behavior.

4 At page 16, they say, well, you know what,
5 let's have them plead guilty and then we'll go through
6 all of our procedures, the Office of Refugee
7 Resettlement. How about following procedure from the
8 get-going, and not separating these kids from -- from --
9 these parents from the children?

10 At page 16, they have the audacity to say they
11 are getting a \$5,000 bond. My clients are indigent.
12 They don't even have 5 cents, Judge.

13 And then they say, at page 15, the reason we
14 are doing that is because we are concerned they might go
15 to Mexico. These guys are from Central America, from
16 Honduras and El Salvador. Again, stereotyping, because
17 not every person with brown skin wants to go to Mexico.
18 These guys don't even have ties to Mexico --

19 At page 18, they suggest to you that they might
20 not even be in for purposes of due process. Well, if
21 that is the case, I would argue that they are not in for
22 1325 purposes. I argued that issue in the Fifth Circuit
23 recently in a 1326 case.

24 At page 18, they suggest, well, you know, if
25 this was a [indiscernible] defendants wouldn't even be

1 able to defend them. Well, that's not true. Minors
2 that sufficiently related, ancillary matters, the
3 statutes provides for -- for us to help these
4 defendants. Not only that, Human Rights Watch, ACLU,
5 they are ready to help.

6 Congress has said -- the governments says that
7 they are concerned with policy. Well, let's remind --
8 let's remind the justice department who does policy.
9 Congress, not the justice department.

10 But if they want to talk about policy -- and
11 I'm going to bring up [indiscernible] we're mentioning.
12 If we allow the government to use these 1325 charges,
13 they are rendering asylum and refugee law meaningless.

14 And most important, Judge, this is something
15 that I want you to take -- take note of this. They are
16 using that mechanism to terminate parental rights, and
17 I'm going to tell you why. Because these clients are
18 going to plead guilty, they are going to be deported,
19 and they are not guaranteeing to keep track of their
20 children. We don't know what's going to happen. And
21 that is terminating parental rights. In this country,
22 even the most serious criminals have a right to due
23 process when terminating parental rights.

24 This is a big problem. They are using,
25 actually, an asylum issue into a parental rights issue.

1 They are having these kids, and the -- and the clients
2 to face extreme hardship because [indiscernible] the
3 children.

4 In their complaints, they don't mention -- you
5 look at every -- every complaint here, every single
6 complaint, they don't mention the existence of the kids.
7 Why? Because they are hiding it, right? But my
8 understanding that today, maybe the press is here, and I
9 don't think they can hide that today.

10 Judge, in closing, I would like to say that,
11 lately, in the news, we have seen that the justice
12 department trumps the courts and congress, but that's
13 not the way it is. Congress writes the laws, and the
14 courts apply the law.

15 William Shakespeare wrote in Hamlet, "Something
16 is rotten in the state of Denmark." Well, something is
17 rotten in the Western District of Texas. The act of
18 separating these parents from their children really
19 stinks.

20 For these reasons, I respectfully request you
21 grant the motion to dismiss.

22 Thank you, Judge.

23 THE COURT: All right. Thank you.

24 And the government wants to respond.

25 MR. RENNIE: Yes, Your Honor.

1 THE COURT: Sure. Come on up, Mr. Rennie.

2 MR. RENNIE: Your Honor, the government agrees
3 that the law should be upheld in this case. The problem
4 for the defendants is that there is no legal basis for
5 the relief they are requesting in this context.

6 The relief they are requesting is completely
7 unprecedented and not supported by a Fifth Amendment or
8 any of the other legal authorities they are citing in
9 their motion.

10 THE COURT: And just so that we're clear, the
11 relief we're talking about is the dismissal --

12 MR. RENNIE: Yes, Your Honor.

13 THE COURT: -- of the cases as a -- as a
14 sanction, essentially?

15 MR. RENNIE: Yes. And that's because this is a
16 criminal proceeding. This is not an asylum case. We
17 are here only on the criminal charges, not here to deal
18 with the immigration consequences of what they are
19 requesting.

20 This Court's jurisdiction is limited to those
21 criminal charges, and what's before the Court is whether
22 they can have any defenses to those charges, whether the
23 government has evidence to show that they indeed entered
24 illegally.

25 Whether they can obtain asylum at some future

1 date is not relevant. It doesn't matter because they
2 were still, by what appears to be their own admission in
3 their filing, aliens to the United States when they were
4 crossing.

5 And, you know, it's not a minor point that they
6 were actually crossing at places that were not a port of
7 entry. If you come in and you're seeking asylum and
8 fleeing violence, one way to do it would just be to walk
9 up through the port of entry, and say, "Hey, I want to
10 seek asylum. I have problems. I'm fleeing back home."
11 That's not what they did here. They were coming across
12 the river at various different points along the border
13 here in El Paso.

14 So even if they could obtain asylum at some
15 point, that doesn't defeat the fact that they were
16 aliens to the United States when they were crossing the
17 border here.

18 Now, second, the remedy here is a trial. You
19 know, the idea that the defendants here are saying that
20 a trial is not adequate or is somehow -- going to trial
21 strips them of their rights, I believe defense counsel
22 said. A trial is their constitutional right. That is
23 their remedy in this situation when faced with a
24 criminal charge. So the idea that this is somehow not
25 an adequate remedy is preposterous.

1 And the Fifth Circuit's case law makes it very
2 clear that, you know, if you had an involuntary plea,
3 even if they could establish that, their remedy would be
4 for that plea to be rendered invalid. Then they could
5 go to trial.

6 THE COURT: In a certain context, *Padilla* says
7 essentially that, right? That at that point and
8 under -- under *Padilla*, because it was not a knowing
9 plea in that particular case -- excuse me. Because it
10 wasn't a knowing plea, because he didn't know the
11 immigration consequences for that particular defendant,
12 basically, the remedy was that this is an invalid plea,
13 and you can go back to the table and renegotiate or have
14 a trial.

15 MR. RENNIE: Exactly, Your Honor.

16 THE COURT: Exactly, right?

17 MR. RENNIE: Yes. And the Fifth Circuit has
18 said that as well in a case -- a case we did cite, that
19 when there was a *Padilla* violation, that's the remedy,
20 that you go back. The plea is rendered invalid. The
21 defendant can then negotiate a new plea agreement or go
22 to trial. That is the remedy in this situation.

23 And, you know, that is if you can establish
24 that a plea is involuntary or you are being coerced in
25 some way, which they haven't done here. And -- and we

1 have cited extensively in our response, there are pages
2 of cases where the Fifth Circuit and other courts have
3 said these types of pressures related to family concerns
4 or even the government withholding some information is
5 not the type of thing that could render a plea
6 involuntary. It has to be knowing and intentionally.
7 There has been no proof here that their ability to make
8 a plea has been overcome. And, again, they haven't
9 actually pled guilty here is the main point.

10 And, you know, there has been a lot of talk
11 about due process and the Flores Settlement. And all of
12 the -- the case law and the Flores Settlement itself,
13 these are also civil cases. These are all civil
14 remedies in the context of their detention on criminal
15 charges.

16 Really, the only due process concern they have
17 is whether that is valid. And we have a statutory basis
18 for that. It's 18, USC, 3142. The case law clearly
19 controls and says that detention in these circumstances
20 at a \$5,000 bond is perfectly reasonable to the extent
21 that, you know, once they resolve their criminal cases,
22 they can bring whatever challenges they want in the
23 context of that immigration proceeding. But that's not
24 why we're here.

25 The Flores Settlement itself, that concerns the

1 detention of juveniles. It doesn't say what the
2 government can or can't do in terms of charging
3 defendants with a 1325 criminal charge.

4 THE COURT: And, in fact, let me just interrupt
5 you briefly. You had a footnote in -- in the response
6 that you filed where you said -- because I -- I
7 requested as part of my briefing order that the
8 government basically -- I want to know what are the
9 policies on this, right? And so -- and you indicated
10 there's no statutory or regulatory authority that
11 compels the government to provide this -- just
12 information, and I -- generally, with regard to the
13 well-being or the location of -- of the defendant
14 parent's kids, there's no authority that compels the
15 government to do that. Correct?

16 MR. RENNIE: We did not find any such authority
17 in our research, Your Honor.

18 THE COURT: By the same token, is there any
19 authority that says that the government -- that it's
20 forbidden from providing that information?

21 Essentially, what I'm getting to is this: I
22 don't think there is something that forbids it, but I
23 think the government makes a policy decision that in the
24 context of defendants that are prosecuted for a 1325,
25 that it's -- they're not provided this information or

1 that there's not a policy in place. Certainly, I don't
2 think you identified a policy with regard to this. Is
3 that correct?

4 MR. RENNIE: As far as I know, Your Honor. But
5 I don't know that that is restricted just to 1325
6 defendants.

7 THE COURT: Sure.

8 MR. RENNIE: I think it's a more general ORR
9 policy, the Office of Refugee Resettlement, which had --
10 we -- any agency that has an unaccompanied child must
11 transfer that child to ORR, and I think it's their
12 general policy that they're very restricted on who they
13 give information to, understandably.

14 And as we noted in our brief, you know, there
15 have been many instances where individuals have been
16 attempting to enter or traffic children --

17 THE COURT: Sure.

18 MR. RENNIE: -- across the border.

19 THE COURT: And it's clear that your office
20 prosecutes them. I mean, there's no question. And it's
21 really what -- what Mr. Garcia was saying, the
22 government pursues those cases and pursues them
23 aggressively.

24 I mean, but -- you know, we -- we handle -- and
25 just in the Western District, thousands of these 1325

1 cases, thousands. I probably -- I'm here five years.
2 I've probably done thousands of sentences, I think.

3 And so this is a newer phenomenon, in my
4 experience here, where, with Central Americans, there
5 are these unaccompanied children, but...

6 And, I mean, I get that point that you're
7 saying that there is no authority that compels you to do
8 it, but there's nothing that forbids you from doing it
9 either. I mean, and -- and -- but that's just --
10 basically, what I'm trying to get to is there is no --
11 no policy specific in -- specific to what information
12 parents get when -- when the parents are accompanied by
13 a minor and when the parents are prosecuted for some
14 immigration crime. There is none.

15 MR. RENNIE: I think ORR has some of their own
16 internal policies which governs how they give out
17 information. So to some extent, I think that may govern
18 the situation you're talking about.

19 THE COURT: All right.

20 MR. RENNIE: Because once they have the child,
21 they want to keep that information confidential.

22 THE COURT: And I'll tell you, just briefly,
23 something that confuses me is, so the parental rights
24 directive and -- and the government indicates, in your
25 response, that it's not really something that applies,

1 and it's, you know, something from a prior
2 administration that's kind of a legal relic, I guess,
3 but it's on the website. I mean, and it -- it talks
4 about, in very strong terms, about how basically that --
5 that -- that ICE will strive to protect the rights of
6 parents in keeping them informed.

7 Even -- you know, even the ORR regs say that
8 when, you know, a child is transferred, I believe the
9 regulation states that, you know, parents are to be
10 informed about where they are, and I -- I just -- I
11 mean, we're getting a little bit apart from -- from kind
12 of the core issues here, which are the motion to dismiss
13 and the constitutional claims. But in terms of that
14 policy, because I do think it affects -- or it can
15 affect -- I should say that -- it can affect issues with
16 regard to voluntariness, that it seems like there's
17 policies that Homeland Security has, ICE has, certainly,
18 that are still active policies. They certainly don't
19 appear to have been rescinded. The public can rely on
20 these websites -- on the ICE website and go to it and
21 read that parental rights directive. But, I mean, I
22 think the government is essentially saying it doesn't
23 apply in a -- in a criminal case where somebody is
24 charged with a crime, where a parent -- a defendant
25 parent is charged with a crime and was accompanied by a

1 minor; and that, in either case, they can wait, and it
2 can be a process where they can wait up to six months
3 while their kids are in -- in immigration proceedings,
4 which basically doesn't really leave them the
5 opportunity to in any way participate in their
6 immigration proceedings while they are happening.

7 If their -- if they -- if the kids are in ORR
8 custody, they are in immigration proceedings, right? I
9 mean, they are in immigration proceedings or deportation
10 proceedings of some sort or they are pursuing asylum
11 claims.

12 But by keeping the parents out of the loop
13 while their case is pending -- or while the criminal
14 case is pending, I mean, it doesn't -- the reality of
15 it -- it's the practical effect of it, I guess, is what
16 I'm saying is they're -- they're not participating in
17 any meaningful way -- in any way whatsoever in their
18 child's legal proceeding, which seems to run counter to
19 ICE's own policy regarding the parental directives
20 policy which even -- it's not as --

21 I mean, the government described it as -- what
22 was it? -- aspirational. But really it does talk about,
23 you know, appointing a parental rights administrator
24 within the certain -- you know, within the districts.
25 There are other kind of substantive things and not just

1 a broad declaration of parental rights, although it does
2 that too.

3 So, I mean, that's really a little bit of the
4 confusion that I get, basically, of what -- what exactly
5 the government policies are. Because in the absence --
6 it seems to me, in the absence of a specific policy to
7 have these parents that are being prosecuted involved in
8 a meaningful way in the immigration procedures -- in
9 immigration proceedings of their kids and just to know
10 their well-being and all these other things, I mean,
11 just to know how their kids are doing, that when they're
12 prosecuted, it's kind of a no man's land of information
13 in terms of their kids. I mean, there is no policy.

14 And it -- the sense that I get is that the
15 government's default position is, in the absence of a
16 policy, the policy is no information. And there's
17 nothing prohibiting us, but there's no information for
18 the parents while the criminal case is pending. And
19 that's -- that gives me a little bit of -- I have a
20 little trouble with that, okay?

21 Now, and I'll -- I'll concede this, it is
22 separate from -- it, in some sense, from the remedies
23 issue, which is really what we've been talking about
24 this morning, what the legal remedies are.

25 But anyways, I don't know if there's anything

1 in there that you want to address or if I have misstated
2 something, but that's just -- that's just something that
3 I wanted to get out -- get out there, just so you know
4 what I'm looking at.

5 MR. RENNIE: I understand, Your Honor.

6 The problem with, I think, what you're saying
7 is that I don't think that they're situation is that
8 much different from anyone who has been detained on
9 criminal charges, any arrestee.

10 Your liberty interests are necessarily going to
11 be restricted if you are in jail because you're facing a
12 criminal charge. And to the extent that they can -- the
13 facility that they're in allows them to pursue ORR's
14 procedures in order to try to obtain more information,
15 they can do that.

16 But they probably -- in a practical sense,
17 you're correct. They don't have the same ability to do
18 so because they are facing criminal charges. So --

19 THE COURT: And let me say, the ORR's own
20 website -- sorry for interrupting. But the ORR's own
21 website says, you know, look into -- their information
22 that they provide is, "We might be able to get a
23 message. If you're a parent and you're concerned, we
24 might be able to get a -- basically, a one-way message
25 to the child," and that's about it.

1 And I don't even know how that 1-800 number
2 that's provided -- and I know we -- we've handled a lot
3 of these cases in this court, Mr. Rennie, when you've
4 been here, and when I've asked about this, "Well, the
5 Border Patrol sometimes, pursuant to ORR regs, provide a
6 1-800 number in -- in English and in Spanish to -- to
7 the defendants," and that's basically it. I don't -- I
8 don't know what other information they're given about
9 that. I mean, that's -- that's really kind of an
10 evidentiary thing, but that's been my sense when I've
11 asked here in court.

12 But, look, I'm going to let you get back to it,
13 but I wanted to raise those issues.

14 MR. RENNIE: I understand, Your Honor.

15 And I think in some of these cases, they --
16 they're -- they did provide that -- that number at
17 least --

18 THE COURT: Right. I think so too.

19 MR. RENNIE: -- to the defendants.

20 I will also point out that the policy on the
21 website that you were talking about, it does explicitly
22 state that it may not be relied upon to create any right
23 or benefit, substantive or procedural, enforceable by
24 law by any party in any administrative, civil or
25 criminal matter. So it is, on its on face, restricted

1 in -- in what it does going forward.

2 THE COURT: And I think even the Flores
3 Settlement has a disclaimer like that.

4 MR. RENNIE: Yes. Yes, Your Honor.

5 And, specifically, with respect to the Flores
6 Settlement, there are, I believe, the Western District
7 of Texas, itself, has held that it doesn't
8 [indiscernible] parental rights. And I think the Ninth
9 Circuit also followed that authority in making a similar
10 finding.

11 As -- as far as due process goes, Your Honor,
12 again, to the extent that, you know, they have parental
13 rights, assuming that they are the parents -- and the
14 government doesn't necessarily know is another big point
15 here, is, you know, when you have people coming across
16 the Rio Grande River with children, you don't
17 necessarily know that this person is the child's parent,
18 even though they may say that. It's -- and it's very
19 difficult to confirm that type of information in this
20 type of circumstance, which is the point we were making
21 in our brief.

22 THE COURT: Yeah.

23 MR. RENNIE: So the other point is that the
24 fact that they're claiming parental rights, and I don't
25 know whether they have -- I can't advise them as far as

1 whether they have some due process right to a parental
2 right in this circumstance, but as far as being confined
3 in -- on criminal charges, that doesn't change the fact
4 that that is adequate and constitutional. And the
5 United States Supreme Court has upheld that statute that
6 allows their detention in *United States versus*
7 *Salerno*.

8 THE COURT: Right.

9 MR. RENNIE: Now, responding to some of
10 these -- these other points, you know, as I was saying,
11 defendant was saying that the law is clear that the
12 Flores Settlement is being violated and says they cannot
13 be separated. That's not what it says. And all of
14 these -- even the policy that we're talking about
15 before, these are talking about immigration detention.
16 They're not talking about criminal defendants who have
17 been charged with illegally entering the country.

18 And some of the other policies that the defense
19 was citing, these are statements from a floor speaker of
20 a single legislator on some appropriations acts.
21 They're not -- they don't necessarily represent the will
22 of congress in the same manner that defense counsel is
23 suggesting.

24 Can I just have a moment, Your Honor?

25 THE COURT: Of course.

1 MR. RENNIE: Thanks.

2 Your Honor, just a couple more quick points.

3 THE COURT: Yes, sir.

4 MR. RENNIE: You know, co-counsel points out to
5 me that one of the key points behind the Flores
6 Settlement was to allow for unaccompanied children to be
7 released to other adults. It's not necessarily
8 something that requires them only to be released to a
9 parent. It was something that was designed for the
10 betterment of those unaccompanied children. And my
11 understanding is that is what ORR tries to do in these
12 situations.

13 I'm also -- co-counsel also pointed out that
14 there is a regulation, 8, CFR, Section 236.3, Subsection
15 F, which requires notice to parents concerning juveniles
16 in detention in some circumstances.

17 THE COURT: Uh-huh.

18 MR. RENNIE: And our point regarding that is
19 that this doesn't really change regarding whether the --
20 the parent is being detained on criminal charges or
21 not.

22 THE COURT: Okay.

23 MR. RENNIE: So it really just goes back to
24 that main point of, you know, if they're being
25 detained -- their liberty is necessarily restricted if

1 they're being detained on criminal charges.

2 And, Your Honor, in conclusion, we would just
3 stress that, you know, this is not an asylum proceeding.
4 It's not an immigration proceeding. There are ways to
5 seek asylum without getting charged with illegal
6 reentry.

7 And the defendants here, among some of the
8 other ones that we've dealt with in the past few months,
9 made a choice, and they decided to cross the river the
10 way they did, not come up through the port of entry, and
11 that's the reason why they're facing criminal charges
12 now, and that's how we find ourselves in this situation.

13 And so, in conclusion, I would point out that
14 this is not something covered by the Court's
15 jurisdiction on criminal charges, and there's no basis
16 for dismissal in this case or any of these cases. Any
17 relief they would be entitled to would just simply be to
18 have an involuntary plea vacated.

19 THE COURT: And -- and I think your -- your --
20 your response, the -- the brief, talks about you believe
21 the remedies in this case -- if there is no
22 constitutional issue, the remedy is really just to make
23 sure -- and -- and you don't disagree that the remedy is
24 to explore the voluntariness of the pleas, number one,
25 and -- and to really get into that issue, basically, as

1 part of a trial-rights-type argument, that -- that the
2 Court can get into that.

3 And there is case law that says, when the Court
4 has some concern or is aware of a particular issue --
5 like, let's say, if somebody -- if there was a mental
6 competency hearing, and they were found competent, but
7 the Court has concerns about mental health, I mean,
8 basically there's no litany. We don't -- we don't
9 follow -- we have little scripts that we follow for our
10 pleas, but on something like that, we can absolute --
11 we're required -- I think the judicial office is
12 required to delve into that issue, develop that issue to
13 make sure that there is not something else at play here,
14 and that the plea is voluntary, and they're pleading
15 guilty because they are guilty and for no other reason.

16 I mean, that's essentially what you're saying,
17 that that's basically the avenue we would need to follow
18 here. Is that correct?

19 MR. RENNIE: We agree that you have discretion
20 to inquire into those subjects, Your Honor, as part of
21 the plea colloquy.

22 But as we've stated our view of the law, our
23 general -- our position is that those types of concerns
24 have not been found to render a plea involuntary.

25 THE COURT: All right. Well, and I don't know

1 that I agree with that necessarily or not. I know you
2 briefed that issue, but I think it is something that a
3 court certainly is required to get into on the record.

4 Again, the sense -- I just want to make sure
5 I'm clear on this. The sense that I get -- that I got
6 from the response and what you're saying today is that,
7 once this proceeding is over -- and these are petty
8 offenses. These are pretty much the lowest type of --
9 or least-severe type of federal offenses that can be
10 charged -- that once this proceeding -- this procedure
11 for the defendants is over, that they're free to pursue
12 whatever immigration relief they -- they think they need
13 to proceed or they feel they need to proceed. Is that
14 correct?

15 MR. RENNIE: Yes. That's our understanding,
16 Your Honor.

17 THE COURT: Okay.

18 MR. RENNIE: Yes.

19 THE COURT: And go ahead. I'm sorry.

20 MR. RENNIE: No. Please continue.

21 THE COURT: What I was going to say was, but
22 that's -- that's their immigration proceeding. But
23 meanwhile, you have their children's immigration
24 proceeding, and your view is that while -- I mean, I
25 think the practical effect of what you're suggesting

1 might be that they don't have a right to be involved.
2 Notwithstanding the parental rights directive, they
3 don't have a right to be involved. Basically, that any
4 involvement they might have in their children's
5 immigration proceeding is stayed while this criminal
6 matter is pending, which can be up to six months. I
7 mean, that's the practical effect of it.

8 I don't see how meaningfully they can
9 participate, and the best they can do under the ORR
10 regulations is to maybe send off a one-way message that
11 some person at a call center at ORR says, "We'll get the
12 message to your child." I mean, I don't know how else
13 they meaningfully participate in their child's
14 immigration proceedings. And they're in immigration
15 proceedings.

16 MR. RENNIE: I understand what you're saying,
17 Your Honor. But our position is that it's not stayed.
18 They -- they can participate to the extent that any
19 criminal defendant who is being detained could
20 participate in that type of situation. I'm sure it's
21 easier to do so once they are out of criminal detention.

22 But I don't see how that's different from any
23 other criminal defendant who has family issues or other
24 civil problems that they are facing.

25 THE COURT: No question -- no question. Once

1 your liberty is restricted, you are restricted from
2 doing that. You know, my sense is just -- you know, in
3 state court, if you had those kinds of issues, CPS is
4 involved, and there's --

5 I mean, some of those parents have rights to
6 visitation, basically, until some court of competent
7 jurisdiction or some tribunal of competent jurisdiction
8 makes a determination that they no longer have parental
9 rights. They have parental rights, even for somebody
10 charged with the most serious crime under the Texas
11 Penal Code. And I'm just using that by way of example.

12 But I just -- the -- let me just say this, and
13 I appreciate your comments this morning. An issue that
14 I -- that I have is that they're really, as a practical
15 matter, there's no meaningful way for these parents to
16 know anything about their kids.

17 I -- I just don't see it even with the ORR regs
18 that -- you know, the handout that they get sometimes --
19 we've seen it in court. I mean, basically, which is
20 what's on the web page. It gives the opportunity for a
21 message. It doesn't provide for a communication between
22 the two. It doesn't provide them the opportunity to
23 participate in -- in the immigration proceedings that
24 their kids are going through. And so, you know, that --
25 that's -- that's just something that has troubled me

1 from the get-go.

2 You know, we -- we get questions in these -- in
3 these immigration 1325 proceedings, you know. Do the
4 defendants have anything to say before we impose
5 sentence? And we go through that very frequently. And
6 you may have been here for some of these, I think,
7 where, "Well, what about my property? What about my
8 IDs?" And, you know, I know -- I know that the Border
9 Patrol has very detailed policies -- I know because I've
10 seen them -- detailed policies about the return of
11 property. And I'm going to tell you, and I will say it
12 right now, I mean, they do a very, very commendable job
13 of getting that property back to defendants.

14 I mean, you know, I -- I -- I mean, I can say
15 that just because I've had these discussions with Border
16 Patrol people, you know, sometimes they might return 60
17 packages of property, clothing and backpacks and, you
18 know, personal effects and other things. They'll return
19 back, work closely with the Mexican consulate in the
20 case of defendants who are Mexican nationals. And so we
21 have these detailed policies, and they do a great job
22 of -- of doing that.

23 I just -- it just surprises me that, in this
24 matter, where it involves something that is paramount
25 important to any parent, okay -- and notwithstanding the

1 concerns of the government with, you know, combating the
2 exploit- -- exploitation of children. I mean, I think
3 they take these matters extremely seriously. You
4 prosecute them seriously. But -- I mean, that's not all
5 the cases, certainly. I mean, that is -- that is part
6 of -- that's something that happens.

7 But, I mean, I think where somebody has a
8 legitimate concern about their kids, it just -- it
9 really surprises me that there is no policy
10 regarding providing some of that minimal information.

11 I believe that the constitution says you have a
12 fundamental right to familial association, and the bare
13 minimum application of that right, in my opinion, would
14 be the providing of some information regarding the
15 well-being of -- of the defendant's children or even
16 providing for some communication.

17 And that's not me just saying that, that's
18 ICE's parental directives from 2013 saying that, which
19 is not a policy that has been rescinded, which is still
20 on their website.

21 And so just so you understand that that's --
22 that's an issue that gives me some concern.

23 All right. And I appreciate your comments.
24 I'm going to take -- I'm going to take just a very brief
25 recess, about two minutes.

1 Chris, let me visit with you.

2 And we're in recess.

3 (Recess taken from 10:21 a.m. to 10:23 a.m.)

4 THE COURT: All right.

5 MR. GARCIA: Judge, before we get going --

6 THE COURT: Yes, sir.

7 MR. GARCIA: -- do you think I could have 30
8 seconds just to clarify one statement that was made?

9 THE COURT: That's fine.

10 MR. GARCIA: I think it's important for the
11 record.

12 One of the statements that was made by the --
13 by the government is that, you know, they have access to
14 this information, they can check the Internet. We have
15 Ms. Zavala right here. Ms. Zavala -- make sure I get
16 Zavala-Zavala, Natividad Zavala, can't even write or
17 speak. She had to sign with an X. I had to tell her
18 how to sign. How is she going to check all this
19 information and dial numbers?

20 And just briefly, the last -- the last -- the
21 last comment, the congressional -- congress intended for
22 these kids to be placed with relatives, that could not
23 have been the intent, because in the case of Ms. Elba
24 Luz Dominguez-Portillo, she has no family. There's no
25 relatives. And like you said, she has no meaningful

1 participation in her child's proceedings right now, as
2 we speak.

3 So I just wanted to make sure that we clarify
4 that for the record. Thank you, Judge.

5 THE COURT: I appreciate that.

6 And, you know, and I -- I will note, just --
7 you know, we had a situation, and I -- I -- I cannot
8 remember the defendant's name, but he was a speaker of
9 an indigenous language from -- he may have actually been
10 from Mexico is my recollection, from Mexico. But in any
11 case, he was not a Spanish speaker. I mean, he was
12 provided the 1-800 number. I don't know what good that
13 1-800 number does in that circumstance at all. I mean,
14 there's -- you know, these very kind of obscure
15 languages here in the United States, so...

16 All right. I'm sorry. You were -- was there
17 anything you wanted to add?

18 MS. FRANCO-GREGORY: Your Honor, if I may.

19 THE COURT: Yes, of course.

20 MS. FRANCO-GREGORY: I need to address certain
21 issues.

22 The -- the hearing -- and I appreciate -- thank
23 the Judge for allowing me to address the Court.

24 THE COURT: Uh-huh.

25 MS. FRANCO-GREGORY: The hearing seems to

1 have -- to have addressed many different issues.

2 THE COURT: Uh-huh.

3 MS. FRANCO-GREGORY: And the Court, along with
4 defense counsel, have made statements regarding policy,
5 procedures, statements made by HSI. And just from a
6 general standpoint, Your Honor, the government would
7 reiterate that these cases have been prosecuted for
8 many, many years. There has been no policy change
9 within the department.

10 THE COURT: Uh-huh.

11 MS. FRANCO-GREGORY: The government has always
12 prosecuted individuals who have illegally entered the
13 United States.

14 THE COURT: Uh-huh.

15 MS. FRANCO-GREGORY: These cases are
16 misdemeanor cases, and as the Court well knows, often
17 these defendants are sentenced to a time of time
18 served.

19 THE COURT: Uh-huh.

20 MS. FRANCO-GREGORY: Unfortunately, these
21 defendants have been in custody nearly five weeks due to
22 the pending litigation.

23 The -- the government would offer that their
24 parental rights are not being terminated. That has
25 never been the contention. The thousands of cases that

1 have been presented to this Court, their -- their
2 parental rights have never been terminated, Your Honor.

3 Indeed, as the Court well knows and as defense
4 counsel well knows, there are situations where children
5 are trafficked. The government and the Western District
6 of Texas deals with a high volume of cases. As the
7 Court noted, thousands of cases come through this
8 Court.

9 THE COURT: Right.

10 MS. FRANCO-GREGORY: There is a method that we
11 have to triage these cases.

12 These defendants have been charged with
13 misdemeanor offenses. Our brief outlines in detail that
14 they could potentially face felony alien smuggling
15 charges. The inquiries that have been made of them only
16 adds to the evidence that supports a felony charge of
17 alien smuggling.

18 However, in this instance, the government has
19 decided to go with misdemeanor charges based on certain
20 factors that are well within the prosecution's
21 discretion.

22 Your Honor, the ORR must safeguard the safety
23 of those children. And for defense counsel to expect
24 that their clients will be provided that information,
25 that that is part of the criminal process, leads to --

1 as outlined in our brief, Your Honor, the further
2 trafficking of children.

3 The Court has heard, defense counsel knows,
4 that alien smuggling organizations specifically advise
5 aliens to enter the United States with children in hopes
6 that they will avoid prosecution and avoid immigration
7 consequences.

8 Your Honor, the -- the procedures are in place.
9 They're there for ORR to safeguard those children, to
10 ensure that they do go back to a parent or to a
11 relative. They're not there to terminate the children's
12 right. The -- the main goal is so that these -- the
13 well-being of the defendant's -- of the children is
14 maintained.

15 Furthermore, Your Honor, the defense has gone
16 into great length about their children and how their
17 parental rights are being terminated, yet defense has
18 offered no proof whatsoever that these are their
19 children.

20 I'm not sure what -- what the purpose of the
21 extent of his argument was, Your Honor. I would
22 reiterate on the record, Your Honor, that the government
23 was ready to go forth on Wednesday, and the defense --
24 defendants had to sit in jail over the weekend because
25 defense counsel was not ready.

1 It's an interesting note that defense counsel
2 notes that the press is in the courtroom today.

3 So I -- I just wanted to make those arguments
4 known, Your Honor. And, of course, I'm not disparaging
5 the Court whatsoever, but I wanted the Court to know
6 that -- that the policy has never changed, Your Honor.

7 THE COURT: I understand. I -- I go back to
8 this issue, though. I mean, and I -- I know that the
9 government takes the position that the regulations
10 governing the Office of Refugee Resettlement and the
11 placement of children that -- that policies are made
12 to -- to basically determine what's in the -- that those
13 policies were enacted to determine what's in the best
14 interest of the children.

15 The flipside of that, though, is that, I mean,
16 the government doesn't -- it has a policy. It talks
17 about parental rights, about how parents need to be
18 involved in their -- in a broad sense, that they have --
19 unquestionably, that there are parental rights.

20 And I -- I just don't see how that declaration
21 by the government -- and it's a policy that they can
22 take off their website. They can rescind tomorrow, if
23 they wish. It's still on there. Then the public can
24 rely on it.

25 I mean, what -- what -- let -- let me just

1 finish.

2 What meaningful rights a parent would have, I
3 mean, I don't think it's -- *Padilla* tells us that your
4 immigration -- the immigration consequences of a plea of
5 guilty can be a critical factor in determining the
6 voluntariness of your plea. It is not that much more of
7 a stretch to say that the immigration consequences of
8 your -- to your minor children -- to your minor
9 children, how that might be a factor. And as a
10 practical matter, it may be the single most important
11 factor that you're considering if you're a defendant,
12 and -- and if you're a defendant charged with these
13 offenses, and it may be the number one thing you want to
14 do.

15 And so a troubling part of this is that part of
16 your motivation would be, since I have no information
17 right now, I have no way of getting any information
18 right now, getting out of here and getting done with my
19 case may be -- as soon as possible may be the best
20 option that I have to try to get involved with my
21 child's immigration status. At this point, they don't
22 know whether they are going to get deported before,
23 after or at the same time as their kids.

24 And -- and that is -- if -- if you were in the
25 defendant's shoes, that would be a consideration. I

1 don't think there's any doubt about that, that that may
2 be the single most important consideration you have in
3 trying to make a determination about your own criminal
4 case, whether you plead guilty or whether you have a
5 trial. So anyways.

6 MS. FRANCO-GREGORY: Your Honor, there is no
7 evidence on the record to support any of those
8 contentions made by these defendants. Indeed, I would
9 reiterate that there is no evidence on the record
10 supporting that those minors that were traveling with
11 those defendants are even their children. Those are a
12 lot of conclusions that have been made, but these
13 defendants have never had the opportunity to address
14 that on the record.

15 THE COURT: Okay. And how does the government
16 allow for a defendant to make that showing, then, in
17 order to get some of this information?

18 MS. FRANCO-GREGORY: Your Honor, the government
19 would rely again on the brief. That is not -- as the
20 Court stated, the Court may go into that issue --

21 THE COURT: Uh-huh.

22 MS. FRANCO-GREGORY: -- at the plea hearing,
23 but the remedy is a trial. The remedy is not a
24 dismissal of the case.

25 And -- and that is really one of the

1 government's prime concerns is that a lot of assumptions
2 have been made on behalf of these defendants, yet they
3 have never had the opportunity to address the Court and
4 put in the record in their own words their concerns.

5 And, again, there is no evidence supporting
6 that the children that they were traveling with are
7 indeed their children. And, again, the safeguards
8 implemented by ORR are to protect those children, to
9 ensure that they were not being trafficked, and that
10 indeed those are their children.

11 So we're making a lot of assumptions. Yet,
12 there is no evidence to support those allegations.

13 THE COURT: And -- and let me just say this:
14 Let's say -- let's assume for the sake of argument that
15 a defendant wanted to make a showing. I mean, there has
16 to be some mechanism for them to make a showing that
17 they're the parent, I mean.

18 And -- and so I just -- what I'm having trouble
19 with is getting a one-way message to the child. Is
20 that -- is that consistent with a constitutional concept
21 of familial relation -- of -- yeah, familial
22 relationships, basically, your parental rights? Just
23 basically not being in communication with your child. I
24 mean, that's what I'm troubled with.

25 MS. FRANCO-GREGORY: But -- but, Your Honor --

1 THE COURT: Setting aside the evidentiary
2 issues, which, you know, you've raised and I
3 understand.

4 MS. FRANCO-GREGORY: But, Your Honor, the
5 assumption there is that there is -- that these are the
6 parents with no evidence to support that they are the
7 parents.

8 THE COURT: So the government's default is that
9 they're not the parents?

10 MS. FRANCO-GREGORY: No, Your Honor. But --
11 and, again, we're going so far away from -- from the
12 issues at hand, which is a criminal prosecution of a
13 misdemeanor illegal entry into the United States. And
14 the government would re-urge what is contained within
15 the brief, that the issue as far as providing them
16 notice as to the status of the child that they were
17 accompanied with is not ripe at this time.

18 THE COURT: All right.

19 MS. FRANCO-GREGORY: And so, again, the issue
20 of establishing whether they're not parents or they are
21 parents is not a matter before the Court. And so the
22 government would rely on that argument and also stress
23 that there is no evidence at this point supporting that
24 they are indeed the parents of those children, and,
25 again, stressing how the government outlined in its

1 brief there are many instances, including misdemeanor
2 cases, where children are brought in with aliens in the
3 hopes of not being prosecuted criminally or are facing
4 immigration consequences.

5 THE COURT: And the government has said that
6 repeatedly, but I'm sure there's many cases where that's
7 not the case.

8 And so, I mean, what -- what is the
9 government -- I'll just ask you if you know. But at
10 what point do the parents get to find out anything about
11 their kid's case?

12 I mean, they may be sitting here -- and, again
13 you've have raised these evidence issues, which I don't
14 think are -- I mean, which I think are -- are
15 legitimate. But I'll tell you this, I mean, if you're
16 making a decision about processing your own case and
17 trying to figure out whether you're going to plead
18 guilty or not, I mean, at what point do you get to find
19 out, according to government policy, if you happen to
20 know, when -- whether you are going to be deported at
21 the same time as your child or before or after or when
22 will they put them in touch?

23 I mean, they're here with minors. And if they
24 process these cases, and they go over -- I'm talking
25 about practical things here. They -- if they plead

1 guilty here and they go over to the camp, at what point
2 do they get to find out anything about their kids?

3 So I don't think there is a mechanism in place
4 for the government. The government is tell -- telling
5 me -- tells me in their brief they are not compelled to
6 do that. But they're not forbidden from doing it
7 either.

8 It's -- I -- again, and I go -- I go to this,
9 as a practical consideration and up here as somebody
10 that has to make a determination on voluntariness of
11 pleas, just not knowing anything about the kids, yes, it
12 could be a factor. I think it could be a factor that,
13 if I was in their shoes, I'd be concerned about where my
14 kids were also.

15 So, in any case, I'll just -- I'll just leave
16 it at that.

17 MR. GARCIA: Judge -- Judge, I --

18 THE COURT: I -- I think -- I'm going to just
19 cut it off here.

20 Is there anything else, Ms. Franco?

21 MS. FRANCO-GREGORY: No, Your Honor. Just that
22 this is a misdemeanor 1325 case, the government
23 establishing whether or not their parents is not an
24 element of this offense.

25 MR. GARCIA: Judge, and you can overrule me on

1 the record if you want to, but I was -- I feel that the
2 comments of having two lawyers argue, I think at least
3 I'm entitled to clarify a couple of things that Ms.
4 Gregory said.

5 THE COURT: I appreciate it. I think we've
6 heard enough argument. At least the Court has.

7 Here is what the Court is going to do, okay?
8 I've heard these arguments. You've heard some of the
9 concerns that I have.

10 In terms of the relief that the defendants are
11 requesting, okay -- this is a motion to dismiss alleging
12 constitutional violations -- I am -- I am going to deny
13 the defendant's motion to dismiss, okay? I will issue
14 an order explaining my reasons, but I am going to deny
15 the motion to dismiss.

16 I don't disagree with the government that some
17 of these issues are issues that are definitely within
18 the purview of the Court, in terms of any possible
19 *Padilla* implications, but certainly under Rule 11 of the
20 Federal Rules of Criminal Procedure involving --
21 regarding the voluntariness of a plea, that those are
22 things that I can consider. But I am -- I am denying
23 the motion.

24 Did you --

25 MR. GARCIA: Yes. I want to object to the

1 ruling pending an appeal in the district court.

2 THE COURT: Yes, sir.

3 MR. GARCIA: So I would like you to, please,
4 allow us to -- to -- to stay the proceedings at least
5 until I file an appeal. I probably could file it today,
6 but I intend to file this with the district court.

7 THE COURT: Okay. Now, here's my -- the
8 problem is this: I'm not going to have an order on this
9 explaining basically the reason for my ruling. I'm not
10 going to have an order on this for, let's say, by the
11 end of the week or early next week.

12 The issue is this. Let me ask you this
13 question: Because we do have the pending matter of
14 this -- of the plea offer that the government wants to
15 put on the record, my question to you is -- and I
16 don't -- I'll leave it to you -- but I don't know
17 whether it affects your appellate rights or not, but do
18 you want to address the issue of whether your clients
19 want to be rearraigned on this issue or -- or whether
20 you want to proceed to trial on these?

21 Basically, here is what I'm going to do: If
22 your clients want to enter a plead -- a plea and change
23 their plea today, I don't know whether that necessarily
24 affects your appellate rights, which --

25 MR. GARCIA: Yeah. I would rather just hold on

1 and let me file my appeal because I believe that the
2 district court might -- may -- may decide otherwise.
3 And if that's the case, then -- then -- then the motion
4 to dismiss is -- is dispositive.

5 Judge, and I know we're establishing a record
6 here, but now that you have denied my motion, you at
7 least need to let me clarify a couple of things, just
8 for purpose of the record, because I'm going to request
9 a transcript.

10 THE COURT: That's fine.

11 MR. GARCIA: And this transcript is going to be
12 used.

13 Ms. Gregory stood up here and told me --

14 THE COURT: Do you want to come up to the
15 podium?

16 MR. GARCIA: Sure.

17 Ms. Gregory stood up here and told you that,
18 you know, this could be alien smuggling -- trafficking
19 matter cases. Well, that's not the case.

20 MS. FRANCO-GREGORY: Your Honor, I object.
21 That's alien smuggling.

22 MR. GARCIA: Judge, this --

23 THE COURT: I'm sorry?

24 MR. GARCIA: -- this is -- this is a pretrial
25 matter.

1 MS. FRANCO-GREGORY: It's alien smuggling, for
2 purposes of the record. I did not say trafficking of
3 minors.

4 MR. GARCIA: Well, alien smuggling.

5 Well, that's not the case. If that was the
6 case, they would not hesitate to charge them with that,
7 and the reason why they can't charge them is because
8 they would have the burden to prove that that is the
9 case.

10 Second of all, she said that we weren't ready
11 last Wednesday. Let me remind Ms. Gregory on the record
12 that, you know, the clients -- the five clients were in
13 three different federal prisons, and they had to be
14 gathered, and they were not gathered until late in the
15 afternoon on Monday. That's why we requested the --
16 the -- this short continuance.

17 And last, Judge, she stood up here telling you
18 these are misdemeanor cases, that they -- that she's
19 concerned with this -- with the well-being of my
20 clients. That's disingenuous. And it's disingenuous
21 because if she was truly concerned, she would not
22 separate them from their children. We don't even
23 separate puppies from a dog, Judge.

24 So based on those issues, I think it's an error
25 to deny the motion to dismiss --

1 THE COURT: Of course.

2 MR. GARCIA: -- and we would like to request,
3 based on the fact that the clients are facing extreme
4 prejudice and -- and hardship, an opportunity to stay
5 the proceedings so that we can file an appeal.

6 I will inform the Court if -- if the decision
7 of my clients change, but I would like to have an
8 opportunity so that I can confer with them, and in the
9 meantime, stay the proceedings.

10 THE COURT: Will you file a motion staying
11 the -- or file -- will you be filing something with the
12 Court staying the proceedings, giving me authority to do
13 so, or -- or indicating to me what my authority is to do
14 so?

15 MR. GARCIA: Well, I -- I could do so, Judge.
16 I -- I -- I certainly can do that.

17 THE COURT: I'm making that request.

18 MR. GARCIA: Okay. Sounds good.

19 THE COURT: If you -- if you could do that and
20 give the government the opportunity to file a
21 response.

22 Now, and at this time -- go ahead, Ms. Franco.

23 MS. FRANCO-GREGORY: Your Honor, we have the
24 trial setting on Friday. And so the government would
25 just offer that the impact of the plea offer that is

1 made to the defendants is diminished every day.

2 THE COURT: Uh-huh.

3 MS. FRANCO-GREGORY: And I -- I would ask,
4 reiterate again that these defendants at least have the
5 opportunity to address the Court, and make certain that
6 defense counsel has apprised them of the plea offer we
7 made on November the 9th.

8 THE COURT: I think -- so we had that matter
9 pending. When I first -- I first saw a motion, which I
10 granted, which the government just basically would be
11 putting their -- the plea offer on the record, and the
12 defendants on the record would indicate whether or not
13 they were accepting or rejecting the plea offer.

14 MR. GARCIA: Once we're done with the pretrial
15 matters, yes, Judge, I guess, at that point, we get to
16 that -- to the *Lafler* motion, yes, that probably would
17 be the case.

18 THE COURT: But what about now?

19 MR. GARCIA: Not right now, Judge. I would
20 like an opportunity to get -- to file an appeal. I'm
21 still dealing with a pretrial matter, which is the --
22 the motion to dismiss. If that motion is granted -- and
23 I'm not sure, I'd have to check to see if I could
24 plea -- if I could file an interlocutory appeal. But if
25 that -- it is granted, then it's dispositive, and

1 this -- my clients will find the relief that we're
2 seeking, so...

3 THE COURT: But -- but -- okay. I'm trying to
4 understand. A *Lafler Frye* hearing is basically to allow
5 to put on the record that a plea offer has been made and
6 the substance of that offer. And your clients would, on
7 the record, say whether or not they were accepting or
8 rejecting this offer.

9 MR. GARCIA: Yes. I guess -- I guess that
10 would be the case, once we get done with the resolution
11 of the motion to dismiss. If the -- if the -- if the
12 district court is denying my appeal or if my clients
13 want -- want to plea, then obviously we'll address
14 that.

15 THE COURT: So you're saying it's untimely, I
16 mean, to --

17 MR. GARCIA: It's untimely, Judge. It's a
18 mechanism to bypass. There is no restriction on speedy
19 trial just because -- if you look at the -- at the -- at
20 the definition --

21 THE COURT: Well, it's your motion.

22 MR. GARCIA: Yeah, exactly.

23 THE COURT: There's no speedy trial issue
24 now.

25 MR. GARCIA: There is no -- there is no issues

1 there.

2 So I would like an opportunity to -- to -- this
3 is a very important issue, Judge. It's -- it's going
4 all across the nation. It's -- it's -- it's a matter of
5 first impression, and I would like to request an
6 opportunity so that I could file the appeal.

7 And while I do that, I will also talk to my
8 clients. If they change their mind and they want to
9 proceed otherwise, I'm sure they will inform me and I
10 will inform the Court. But I'd like to have the
11 opportunity to, at least, to -- to file that appeal, and
12 to confer with my clients and explain to them what just
13 happened.

14 MS. FRANCO-GREGORY: And, Your Honor, the trial
15 setting is set for Friday. The government -- again, the
16 plea offer is diminished each day. The trial setting
17 hasn't gone away.

18 THE COURT: What do you mean that, that it's
19 diminished?

20 MS. FRANCO-GREGORY: So the offer that we made
21 to the defendants, the impact of that plea is diminished
22 the closer we get to trial.

23 MR. GARCIA: Right. Without getting to the
24 merits of -- of what Ms. Gregory is talking, okay,
25 without getting to the merits, Judge, let me just point

1 out one thing. These plea agreements are nothing but a
2 legal fiction, and I'm going to tell you why. Because
3 there is no judge -- and I clerk for six different
4 judges all across the nation. There is no judge that
5 would sentence these misdemeanor defendants to anything
6 other than time served, okay?

7 The fact that she -- the fact that she is
8 offering this plea agreements, it doesn't make the
9 penalty harsher for my clients, Judge.

10 THE COURT: Look, the point is whether the
11 government has the right to put that offer on the
12 record, and that your clients can accept or reject it at
13 that time, okay -- at that time.

14 Given my decision this morning, given the fact
15 that you'll be filing a motion to stay, I guess, pending
16 whatever appeal you're -- you're -- you will be
17 pursuing --

18 MR. GARCIA: Because I don't want to waive any
19 issues, Judge. I waited -- I need to make sure that a
20 procedure is correctly, because even if one client
21 decides to go with this, you know, I don't want to have
22 any waivers. The Fifth Circuit is very strict on
23 waivers. So that's why I'm asking you for an
24 opportunity so that I can file the -- the -- what you
25 request, to stay the proceedings, and so that I can file

1 an appeal, because, you know, I'm concerned with waiving
2 issues.

3 So I can't -- I can't go ahead with the *Lafler*
4 *Frye* hearing, and then the Fifth Circuit constitutes
5 that as a waiver. I can't do that.

6 THE COURT: All right. Look, I had granted it
7 just to get the -- just to get that offer on the record.
8 If you're saying that it's premature to do that, I mean,
9 you can -- you can brief that. You can brief that, and,
10 I mean --

11 MR. GARCIA: Well, it's a pretrial matter,
12 Judge, and pretrial matters are dealt with before we get
13 to the trial matters, which is -- you know, the *Lafler*
14 *Frye* hearing is a matter just before a trial.

15 THE COURT: Look, I understand the concerns
16 that you're raising, okay? That you don't -- you're
17 concerned about any waivers your clients might be making
18 in light of a -- in light of the fact that they'll be
19 appealing this decision.

20 The question is whether this is something that
21 the -- does the government have the right to put this --
22 this on the record right now? I mean, I have granted
23 this. I understand your concerns, but I would like you
24 to raise them.

25 But my inclination is to have a hearing at

1 which this plea offer is conveyed to your clients, okay,
2 without, in any way, affecting any appellate rights. If
3 you're telling me your review -- brief this issue and
4 you give me an authority that says we cannot have that
5 hearing without impacting their appellate rights, then
6 I'll reconsider my decision. But other than that, it's
7 a hearing that I would be inclined to have.

8 Do you understand?

9 MR. GARCIA: Yes, Judge. I think this is their
10 motion. They should be filing the brief, and I should
11 be responding. Why should we have this matter when I
12 have indicated to you, in magistrate court -- courtroom,
13 that I want to appeal your decision of a motion to
14 dismiss to the district court?

15 I mean, if the Court wants me, I will file
16 the -- the petition or the briefs so that we hold on to
17 this *Lafler Frye* hearing. But they should be the ones
18 that they should tell you under what authority they have
19 to bypass this pretrial.

20 THE COURT: Here -- here is the thing, I
21 granted that, all right? I granted that. But you're
22 taking a different -- not a different position. You're
23 taking a different position today based on my decision,
24 and, you know, I had -- I understand why you're saying
25 that.

1 MR. GARCIA: Yeah.

2 THE COURT: But the issue is, if you're telling
3 me, now we can't have that hearing, I want -- I want you
4 to tell me why we can't have it.

5 MR. GARCIA: Okay.

6 THE COURT: And -- and you can file it in -- in
7 the form of a motion to reconsider the granting of the
8 *Lafler Frye* hearing, and I will -- I mean, I'll continue
9 that issue, but -- but I'd like something --

10 MR. GARCIA: Yeah.

11 THE COURT: -- as soon as possible.

12 MR. GARCIA: And also I just want to point out
13 for the record --

14 THE COURT: Yes, sir.

15 MR. GARCIA: -- now that you're asking me to
16 file this, I'm going to -- I'm going to argue that it
17 was fairer for you to -- to grant it in advance.

18 THE COURT: And that's fine. You can raise
19 those issues.

20 MR. GARCIA: Yeah.

21 THE COURT: Okay.

22 MR. GARCIA: It was fairer to grant it because
23 I assumed you granted it before making a determination
24 on the motion to -- to dismiss on this, that was already
25 decided. But yes.

1 THE COURT: I just decided today --

2 MR. GARCIA: Okay. Okay.

3 THE COURT: -- so the answer to that is yes.

4 MR. GARCIA: I just want to make sure that
5 that's on the record like that, yeah. Okay. Okay.

6 THE COURT: I mean, but -- but here's the
7 thing: What I'm going to afford you is the opportunity
8 to provide some authority to say, Judge, you need to
9 reconsider that, and -- but, you know, I would like that
10 issue -- and you can address it separately or whatever,
11 but I also want you to give me to -- to tell me what my
12 authority is to stay this issue pending appeal.

13 MR. GARCIA: Okay.

14 THE COURT: Okay. Because we have that -- and
15 we have a trial setting set on Friday --

16 MR. GARCIA: I will do so, Judge. I will do
17 so, Judge.

18 THE COURT: -- which --

19 MR. GARCIA: But I just want to remind the
20 Court of the extreme hardship and prejudice that my
21 clients will face, [indiscernible] and continue --
22 continue accordingly and maybe creating possibility of
23 waivers for -- for these clients. So I need to be --

24 THE COURT: I'm not sure I follow you on
25 that.

1 MR. GARCIA: What I -- what I'm saying is that
2 thanks for the opportunity to give me -- that you're
3 giving me to file that brief so that we could stay this
4 proceeding because at stake -- at stake there is some
5 major important interest of these clients.

6 THE COURT: You have an absolute -- they have
7 an absolute right to appeal this issue. I don't want to
8 make any decision that would impact on that. That's why
9 I'm giving you these opportunities to address that
10 issue.

11 MR. GARCIA: Thank you.

12 THE COURT: And -- but just to be clear, okay,
13 I'm asking you to file something in writing where you're
14 making your request in writing to stay these
15 proceedings, okay? And we have that trial setting on
16 Friday.

17 The second thing is, with regard to the *Lafler*
18 *Frye* hearing, that you take up -- basically, I mean, if
19 you're asking the Court to reconsider that, which it
20 seems like that's what you're doing, you tell me why we
21 can't have it --

22 MR. GARCIA: Okay.

23 THE COURT: -- given -- given the fact -- you
24 know, and I guess what you're driving at is that it
25 somehow could impact --

1 MR. GARCIA: Absolutely.

2 THE COURT: -- potentially the appellate --

3 MR. GARCIA: Constitutional rights.

4 THE COURT: -- rights, but you have to show me
5 that, because I will tell you I'm inclined to have it,
6 to put it on the record, and do it sooner rather than
7 later.

8 So you address these issues. I just would ask
9 you that you address them in short order, all right?

10 MR. GARCIA: I will.

11 THE COURT: Anything else? Anything else,
12 Mr. Garcia?

13 MR. GARCIA: No, Judge.

14 THE COURT: All right. Anything else from the
15 government?

16 MS. FRANCO-GREGORY: No, Your Honor.

17 THE COURT: Okay. Very well, then. We're in
18 recess.

19 (Proceedings concluded)
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1 CERTIFICATE OF ELECTRONIC RECORDING

2
3 I, Rhonda McCay, CSR, RPR, certify that the
4 foregoing is a correct transcription from the electronic
5 recording of the proceedings in the above-entitled
6 matter.

7 I further certify that I am neither counsel
8 for, related to, nor employed by any of the parties to
9 the action in which this electronic recording was taken,
10 and further that I am not financially or otherwise
11 interested in the outcome of the action.

12 Signed this 5th day of December, 2017.

13
14
15 /s/ Rhonda McCay_____
16 Rhonda McCay, RPR, CSR 4457
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